IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,	)	No. 62074-6-I
	)	
Respondent,	)	
	)	
v.	)	
	)	
DAVID A. OPPELT, JR.,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: April 12, 2010
	)	

Ellington, J. — A delay in bringing criminal charges may violate due process. Where a defendant shows actual prejudice resulting from the delay which, balanced against the State's reasons for the delay, offends fundamental concepts of justice, dismissal is required. Here, six years passed before David Oppelt was charged with child molestation in the first degree. During that time, one of the chief prosecution witnesses developed a medical condition that affected her memory. The trial court concluded this caused prejudice but did not deprive Oppelt of a fair trial and did not outweigh the State's interest in prosecuting him. We affirm his conviction.

Oppelt also appeals certain community custody conditions imposed as part of his sentence. The State concedes error, and we remand for resentencing.

BACKGROUND

In 2001, eight year old A.R. was living with her great-grandmother and her husband, Bertha and Floyd Olson. In May, Bertha and Floyd went on vacation, and A.R. spent about two weeks with her mother Denise and David Oppelt. A.R. returned to the Olson's home on May 16. That night, she complained to Bertha of soreness in her private area, and said that Oppelt had rubbed her genitals and had digitally penetrated her on two occasions. Bertha gave A.R. a lotion to apply on her genital area.

The next day Bertha informed Denise about A.R.'s allegations. Denise contacted police and took A.R. to an emergency room for examination. The nurse observed redness and swelling in the labia majora, but no signs of trauma. The nurse was not able to examine A.R.'s hymen that day and asked A.R. to return the following week. She instructed A.R., Bertha and Denise to exercise good hygiene and not use lotions and creams in the genital area. At the follow up examination, a different nurse examined A.R.'s hymen and found very slight redness on the labia but no signs of trauma.

Children's Protective Services (CPS) was notified. At the CPS hearing, several adult female family members testified that Floyd had molested them as children. A.R. was removed from Bertha and Floyd's home.

On May 18, child interview specialist Kelly Bradley from the Everett Police Department interviewed A.R., who expressed anger at Oppelt and wanted him to move out so she could be reunited with her mother. Bradley did not ask A.R. about the

allegations against Floyd.

Detective Jensen was assigned to the case. He interviewed Denise, Bertha, and Melissa Whittall, an aunt of A.R.'s who had overheard her complaint to Bertha. Detective Jensen also interviewed neighbor Bonnie Bortles who, according to A.R., interrupted one of the two incidents when Oppelt molested her. Bortles went to Oppelt's bedroom on May 14, 2001, to pick up some documents. Oppelt was on one side of the bed, A.R. was on the other side. She was covered with a blanket, and only her elbow was sticking out. Oppelt asked Bortles to leave the room so he could get dressed.

Detective Jensen also interviewed Oppelt, who denied the allegations and stated A.R. may have accused him because he had been violent toward her mother. Oppelt also suggested Floyd may have touched A.R. Jensen did not pursue the allegations against Floyd.

Jensen finished his investigation on August 2, 2001 and referred (or planned to refer) the case to the prosecutor's office.[1]

Nothing happened on the case until June 2007, when a CPS worker inquired about it. A prosecutor tracked down Jensen's referral, and a follow-up investigation was ordered. The prosecutor determined that all original witnesses were still available to testify, except for Whittall. In the meantime, Jensen's field notes were lost.

[1] CPS also conducted an investigation of the allegations. Although CPS initially concluded A.R.'s allegations of sexual abuse were founded, CPS reversed that decision two days later and allowed A.R. to return to Oppelt's home. CPS also noted that in 1997, A.R. accused Denise's then-boyfriend of similar acts. No legal action was taken in that case, but Denise asked her boyfriend to move out.

The prosecutor's office filed an information on November 26, 2007, charging Oppelt with child molestation in the first degree. The information was amended in April

2008 to add a charge of rape of a child in the first degree.

Oppelt moved to dismiss pursuant to the due process clause and CrR 8.3(b) on grounds of preaccusatorial delay. The motion was decided on declarations and the affidavit of probable cause.

Oppelt argued he was prejudiced by the loss of Jensen's field notes and the inability to interview A.R. at the time of the initial report. Oppelt also argued that during the intervening years Bertha had developed hypothyroidism, a medical condition that affected her memory.

The critical issue regarding Bertha's memory was the lotion. According to the defense attorney, Bertha could remember A.R.'s allegations but remembered nothing about the lotion. She did not remember that Floyd picked up A.R. that night, that Floyd was living with her, that they had been on vacation prior to A.R.'s disclosure, or that she had spoken to a police officer about A.R.'s claims.

According to the prosecutor, however, when Bertha was given an opportunity to review her statement and excerpts from police reports, she stated they were relatively accurate. She clarified she had not actually applied the lotion herself. She believed the lotion was "Vagasil" and said that she would not have asked A.R. to apply a perfumed lotion on her private area.

The State conceded negligence in the filing delay. The court concluded that Oppelt was prejudiced by Bertha's loss of memory, but that his other claims of prejudice, from the loss of the detective's field notes and the opportunity to interview A.R. at the time of the allegations, were too speculative. The court ruled that Oppelt

had not shown he could not get a fair trial and that the State's interest in prosecution outweighed any prejudice to Oppelt.

The case proceeded to trial before a jury. All available witnesses, including A.R., Bertha, Bortles and Oppelt, testified. The jury convicted Oppelt of child molestation in the first degree and found him not guilty of rape of a child in the first degree. The court imposed a standard range sentence along with various conditions of community custody. Both Oppelt and the State appeal.

ANALYSIS

Preaccusatorial Delay

Delay in bringing charges may violate due process.[2] The State concedes negligence in the filing delay. The State contends, however, that under United States Supreme Court precedent, negligent delay cannot establish a due process violation.

The United States Supreme Court has not directly addressed whether negligence is sufficient to establish a due process violation in this context.[3] The federal circuits are split on the issue. A majority of the circuits demand a showing that the government acted in bad faith or intentionally delayed the indictment to gain tactical advantage over the accused.[4] The Fourth and Ninth Circuits,

---

[2] United States v. Lovasco, 431 U.S. 783, 97 S. Ct. 2044, 52 L. Ed. 2d 752 (1977).

[3] See Hoo v. United States, 484 U.S. 1035, 1036, 108 S. Ct. 742, 98 L. Ed. 2d 777 (1988) (White, J., dissenting) (arguing the court should have granted certiorari to decide the issue in light of the "continuing conflict among the Circuits on this important question of constitutional law").

[4] See Commonwealth v. Scher, 569 Pa. 284, 803 A.2d 1204, 1217–18 (2002) (noting that the First, Second, Third, Fifth, Sixth, and Tenth circuits apply this

[5] on the other hand, have explicitly rejected the bad faith requirement in favor of a lesser showing of government culpability that includes negligence. [6]

The State contends that United States Supreme Court jurisprudence in civil rights cases establishes that merely negligent government conduct does not rise to a due process violation, relying on cases holding that section 1983[7] plaintiffs must show more than ordinary negligence on the part of state actors in order to recover for violations of either substantive or procedural due process.[8] But section 1983 and preaccusatorial delay cases are similar only in that both involve the concept of due

---

standard). These circuits also hold that no balancing is required.

[5] See Howell v. Barker, 904 F.2d 889, 895 (4th Cir. 1990); United States v. Ross, 123 F.3d 1181, 1184–85 (9th Cir. 1997). The State argues another decision called into question Howell's validity; however, the same decision recognizes that Howell is still the law in the Fourth Circuit. See Jones v. Angelone, 94 F.3d 900, 905 (4th Cir. 1996).

[6] It is unclear into which camp the Seventh Circuit falls. See United States v. Dote, 150 F. Supp. 2d 935, 938 n.5 (2001) (recognizing that different courts have interpreted differently the Seventh Circuit's decision in United States v. Sowa, 34 F.3d 447 (7th Cir. 1994)).

[7] 42 U.S.C. § 1983.

[8] See County of Sacramento v. Lewis, 523 U.S. 833, 848–49, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998) ("We have . . . rejected the lowest common denominator of customary tort liability as any mark of sufficiently shocking conduct, and have held that the Constitution does not guarantee due care on the part of state officials; liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process. It is, on the contrary, behavior at the other end of the culpability spectrum that would most probably support a substantive due process claim; conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level.") (citations omitted); Daniels v. Williams, 474 U.S. 327, 328, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986) ("the Due Process Clause is simply not implicated by the negligent act of an official causing unintended loss of or injury to life, liberty, or property") (emphasis omitted); Davidson v. Cannon, 474 U.S. 344, 348, 106 S. Ct. 668, 88 L. Ed. 2d 677 (1986) ("As we held in Daniels, the protections of the Due Process Clause, whether procedural or substantive, are just not triggered by lack of due care by prison officials).

process.[9] This is not enough to support the State's argument, which has not been adopted by any federal circuit. There being no clear United States Supreme Court precedent on the issue, we follow our own court precedent.[10] Negligent preaccusatorial delay may establish a due process violation.

Our Supreme Court has developed a three prong test for determining when preaccusatorial delay violates due process: the defendant must show he was prejudiced by the delay; the court must consider the reasons for the delay; and the court must undertake a balancing of the State's interest and the prejudice to the accused.[11] The ultimate test is "whether the action complained of . . . violates those 'fundamental conceptions of justice which lie at the base of our civil and political institutions.'"[12] We review this issue de novo.[13]

A defendant must show actual prejudice to his defense in order to satisfy the first prong of the test.[14] This means "'sufficient [prejudice] to overcome the legislative intent

---

[9] See Hannah v. Larche, 363 U.S. 420, 442, 80 S. Ct. 1502, 4 L. Ed. 2d 1307 (1959) ("'Due process' is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. . . . Therefore, as a generalization, it can be said that due process embodies the differing rules of fair play, which through the years have become associated with differing types of proceedings. Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account.").

[10] State v.Berlin, 80 Wn. App. 734, 740, 911 P.2d 414 (1996), reversed on other grounds, 133 Wn.2d 541, 947 P.2d 700 (1997).

[11] State v. Salavea, 151 Wn.2d 133, 139, 86 P.3d 125 (2004).

[12] State v. Calderon, 102 Wn.2d 348, 353, 684 P.2d 1293 (1984) (quoting Lovasco, 431 U.S. at 790).

[13] Salavea, 151 Wn.2d at 138.

to prosecute the crime as evidenced by the absence of a statute of limitation.'"[15]

As a threshold question, the parties disagree as to what record should be reviewed. The State argues that we should examine not only the pretrial record but the record at trial as well. In other contexts, courts have rejected a similar approach.[16] We decline to adopt a fixed rule, but look first to the motion record.

At the pretrial motion to dismiss, both Oppelt and the State chose to stand on the factual assertions made in the State's affidavit of probable cause and the affidavits of the defense attorney and the prosecutor. Based on those submissions, the court concluded:

> Bertha Olson's inability to recall the type of lotion used and who applied it to the victim's genital area as well as Bertha Olson's medical condition that affects her memory is sufficient to satisfy the defendant's burden of showing actual prejudice resulting from the delay in this case.[17]

The State argues these facts are insufficient to establish prejudice, and that the court's conclusion rests on unsupported speculation that Bertha would have given testimony

---

[14] Id. at 139.

[15] State v. Potter, 68 Wn. App. 134, 140, 842 P.2d 481 (1992) (alteration in original) (quoting State v. Newcomer, 48 Wn. App. 83, 92, 737 P.2d 1285 (1987)).

[16] See State v. Jessup, 31 Wn. App. 304, 317, 641 P.2d 1185 (1982) (in reviewing court's order on a motion to suppress evidence on grounds of illegal search, held, "[O]nly that evidence presented at the suppression hearing will have bearing on the defendant's expectation of privacy."); see also State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994) ("Under the facts of this case, *as established by the trial court at the suppression hearing*, we hold that the sweatpants were not an extension of defendant's person, but part of the premises to be searched.") (emphasis added); State v. Jackson, 82 Wn. App. 594, 609, 918 P.2d 945 (1996) (claim of insufficient evidence is analyzed using the most complete factual basis available at the time the claim is made).

[17] Clerk's Papers at 94.

favorable to the defense.

A mere allegation that witnesses are unavailable or that memories have dimmed is insufficient; the defendant "'must specifically demonstrate the delay caused actual prejudice to his defense.'"[18] But this case is unlike those cases where defendants rely solely on the possibility of fading memories.[19] In 2007, Bertha believed that the lotion was Vagisil. There was, however, no reference to Vagisil in her 2001 witness statement. Therefore, that Bertha would have testified closer in time to 2001 that the lotion was not Vagisil but something else is not speculation but a reasonable probability.

In its oral ruling, the court explained that Oppelt was prejudiced by his inability to argue at trial that the specific lotion used could cause the kind of redness A.R. displayed when examined in the emergency room. We agree that this information could have bolstered Oppelt's defense. The court did not err in concluding Oppelt suffered prejudice.

Once prejudice is shown, the State must explain the delay.[20] The State concedes that Oppelt's case "fell through the cracks" through negligence, and acknowledges that our Supreme Court has consistently held that negligent delay may

---

[18] State v. Norby, 122 Wn.2d 258, 264, 858 P.2d 210 (1993) (quoting State v. Gee, 52 Wn. App. 357, 367, 760 P.2d 361 (1988)).

[19] See, e.g., State v. Bernson, 40 Wn. App. 729, 734–35, 700 P.2d 758 (1985) (no prejudice where defendant alleged the passage of time precluded him from establishing an alibi due to fading memories of potential witnesses).

[20] Courts consider the State's reasons for the delay only if the defendant proves prosecutorial delay prejudiced his defense. Salavea, 151 Wn.2d at 145.

violate due process.[21]

Oppelt argues negligent delay is always unjustified and therefore any actual prejudice from negligent delay requires dismissal. He relies upon State v. Frazier,[22] in which Division Two of our court appears to have adopted such a rule. Frazier also involved a negligently misplaced file and resulting charging delay, albeit for a much shorter time. The court held that "the State provided no reason for the delay, and that this negligent delay was unjustified; therefore, [the trial court] did not need to reach the third step and balance the interests of the State and Frazier."[23]

This Division, however, has taken the opposite view. In State v. Schiefferl,[24] negligent preaccusatorial delay led to loss of the benefit of juvenile court jurisdiction, and the trial court held the State's negligence, without more, justified dismissal of the charges. We reversed:

> We believe the trial judge erred in his conclusion that the negligence shown in this case was sufficient as a matter of law to justify dismissal. The error lies in his failure to complete the analysis required by the applicable Washington case law. . . . After the defendant has made the requisite showing of prejudice, . . . the court must consider the reasons for the delay and the degree of prejudice to the defendant. That is, the State's reasons for the delay must be balanced against the resulting prejudice to the defendant.[25]

---

[21] See Salavea, 151 Wn.2d at 139; State v. Dixon, 114 Wn.2d 857, 865, 792 P.2d 137 (1990); State v. Lidge, 111 Wn.2d 845, 848, 765 P.2d 1292 (1989); State v. Alvin,109 Wn.2d 602, 604, 746 P.2d 807 (1987); Calderon, 102 Wn.2d at 352–53.

[22] 82 Wn. App. 576, 918 P.2d 964 (1996).

[23] Id. at 592. The court nonetheless did balance those interests, and concluded dismissal was warranted. Id. at 592–93.

[24] 51 Wn. App. 268, 753 P.2d 549 (1988).

[25] Id. at 271–72.

We adhere to our reasoning in Schiefferl. Oppelt argues, in essence, that a valid justification for delay should be required before reaching the balancing prong. But where there is a valid justification, there is no due process violation.[26] Further, a rule that negligence mandates dismissal because it is not a "valid reason" would lead to absurd consequences. Where delay causes any degree of prejudice, cases would be dismissed automatically if the delay were negligent. But deliberate, unjustified delay would require a balancing test. This makes no sense. The trial court correctly proceeded to the balancing prong.

Oppelt claims the court erred in the balancing phase by improperly considering the effect of the passage of time on the State's proof. We see no impropriety here. The court's task is to discern the degree of prejudice to the defendant and whether the defendant can receive a fair trial. The court concluded the prejudice to Oppelt was not significant. Bertha's memory issues made her a vulnerable witness. Oppelt retained all his arguments concerning the lotion and the sexual abuse allegations against Floyd, and could argue the loss of Detective Jensen's field notes. As the court summarized, "the defense is really able to present all of their defenses even with the passage of time and that that has not affected them and that in some ways, the State's going to have much more of a challenge, . . . given the passage of time."[27]

The court then properly balanced the prejudice to Oppelt and the State's interest

[26] See Lovasco, 431 U.S. at 796 (investigatory delay cannot form the basis for a due process violation even if the defendant might have been prejudiced by the lapse of time.).

[27] Report of Proceedings (RP) (June 5, 2008) at 38–39.

in prosecution. The court noted the apparent ambivalence of the victim (now a teenager) about the prosecution, but observed that the State, not the victim, decides

whether to prosecute, and that prosecution serves multiple societal purposes, including administration of justice, accountability of offenders, protection of society, and protection of other children from offenses "like those in this case."[28]

As we said in Schiefferl, "[T]here are degrees of negligence, degrees of culpability, as well as degrees of prejudice, and only if the balance weighs so that the result offends fundamental conceptions of justice is dismissal justified."[29] If merely negligent conduct is asserted, the prejudice suffered by the defendant will have to be greater than where intentional or deliberate government conduct is alleged.[30] The minimal prejudice to Oppelt resulting from this unfortunate delay does not outweigh the State's interests in prosecuting him and did not deny him a fair trial.

The court did not err in denying Oppelt's motion to dismiss on due process grounds.

Misconduct

Oppelt also argues dismissal was mandated by CrR 8.3(b), which governs dismissals of criminal actions for governmental misconduct:

> The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial.

A trial court may not dismiss charges under CrR 8.3(b) unless the defendant shows by a preponderance of the evidence arbitrary action or governmental misconduct and

---

[28] Clerk's Papers at 94.

[29] Schiffer, 51 Wn. App. at 273.

[30] Id.

prejudice affecting the defendant's right to a fair trial.[31]

Dismissal under CrR 8.3(b) is an extraordinary remedy and requires a showing of actual prejudice.[32] Governmental mismanagement need not amount to evil or dishonest acts; simple mismanagement is enough.[33] A trial court's decision on a motion to dismiss under CrR 8.3(b) is reviewed for an abuse of discretion.[34]

The State's negligent delay qualifies as mismanagement. However, for the reasons explained in detail above, the prejudice to Oppelt from the delay did not affect his right to a fair trial. The court did not abuse its discretion in denying Oppelt's CrR 8.3(b) motion.

Community Custody Conditions

Finally, Oppelt challenges the following conditions of his community custody: prohibition from possessing or accessing pornographic materials; prohibition from associating with known users or sellers of illegal drugs and possessing drug paraphernalia; and injunction to "stay out" of drug areas, as defined by the supervising community corrections officer. He argues the court had no authority to impose the conditions because they were not related to the offense. He also argues the condition prohibiting possession or access to pornography is unconstitutionally vague.

"'In the context of sentencing, established case law holds that illegal or

---

[31] State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

[32] Id. at 658.

[33] State v. Michielli, 132 Wn.2d 229, 239, 937 P.2d 587 (1997).

[34] Rohrich, 149 Wn.2d at 654.

erroneous sentences may be challenged for the first time on appeal.'"[35] However, sentencing challenges, including challenges to community custody conditions, can be waived.[36] The State contends Oppelt waived his objections when he successfully objected to a condition prohibiting him from possessing or consuming alcohol or frequenting establishments where alcohol is the chief commodity for sale. Defense counsel made the following comment:

> I just overlooked that in my review of the [recommended] conditions, but it just basically has nothing to do with anything in this case. That is not otherwise, it's not otherwise legal to consume alcohol or, I think it says: Frequent establishments where alcohol is the chief commodity for sale. So I ask that additional prohibition, since it has nothing to do with this case, wouldn't be put on. *As far as the other drug related conditions, those are all things that are illegal anyway, so I don't have any objection to that.*[37]

Counsel demurred only as to drug-related prohibitions that are independently illegal. It is not illegal to associate with drug users or to be in high drug use areas. There was no waiver. Oppelt also did not object to conditions prohibiting possession of and access to pornography or frequenting establishments whose primary business pertains to sexually explicit or erotic material. But mere failure to object does not waive the right to appeal a community custody condition.[38] The pornography-related conditions are also not waived.

---

[35] State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (quoting State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999)).

[36] See State v. Julian, 102 Wn. App. 296, 304, 9 P.3d 851 (2000) (right to challenge community supervision conditions is not waived by failure to object below).

[37] RP (July 16, 2008) at 29.

[38] See Julian, 102 Wn. App. at 304.

The State concedes the drug-related conditions are not related to the circumstances of Oppelt's crime and that the pornography-related condition is unconstitutionally vague. We accept the State's concessions.[39] [40]

The court did not err in refusing to dismiss for preaccusatorial delay on due process and CrR 8.3(b) grounds. We thus affirm Oppelt's conviction.

We remand for vacation of sentencing conditions in accordance herewith.

Ellington, J.

WE CONCUR:

Cox, J.

Becker, J.

[39] See former RCW 9.94A.700(5)(e) (2008), recodified as RCW 9.94B.050 ("As a part of any terms of community placement imposed under this section, the court may also order one or more of the following special conditions: . . . (e) The offender shall comply with any crime-related prohibitions."); former RCW 9.94A.030(11) (2008), recodified as RCW 9.94A.030(10) ("'Crime-related prohibition' means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted."); see also State v. Jones, 118 Wn. App. 199, 208, 76 P.3d 258 (2003) (striking a condition requiring defendant to submit to alcohol evaluation and treatment because the evidence did not show alcohol was related to the offense).

[40] Bahl, 164 Wn.2d at 758 (holding the restriction on accessing or possessing pornographic materials is unconstitutionally vague)